

Message Text

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DRAFTED BY EUR/CE:AMKLINGAMAN/SEC:IBOROWSKI:EM

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L/EUR:JWILLIS

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FM SECSTATE WASHDC

TO AMEMBASSY BERN PRIORITY

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E.O. 11652: NA

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SUBJECT: SEC V. AIC

REF: (A) BERN 4009

1. BOROWSKI HAS PROVIDED DEPARTMENT WITH NINE PAGE STATEMENT IN RESPONSE REFTEL. FULL TEXT AIRPOUCHED TO KEMPE. FOLLOWING IS SUBSTANCE OF BOROWSKI'S RESPONSE.

2. PAYMENTS TO COOPERS AND LYBRAND OF BOSTON: COOPERS AND LYBRAND OF BASEL RECENTLY INFORMED COOPERS AND LYBRAND OF BOSTON THAT IT CANNOT BE PAID UNDER SWISS BANKING COMMISSION DECREE FROM FUNDS IN SWITZERLAND BUT MUST BE PAID OUT OF US FUNDS. THIS WILL MAKE IT IMPOSSIBLE FOR COOPERS AND LYBRAND OF BOSTON TO PARTICIPATE IN THE AUDIT, SINCE THEY WILL NOT WORK UNLESS PAID AND THE ONLY FUNDS OUT OF WHICH TO PAY THEM ARE IN SWITZERLAND. THE SEC IS DISTURBED BY DR. MUELLER'S REPORTED SUGGESTION THAT A MAXIMUM AMOUNT WAS NEGOTIATED WHICH COULD BE USED FOR PURPOSES OF CARRYING OUT THE DECREE. THE ONLY AMOUNT NEGOTIATED IN CONNECTION WITH THE SWISS BANKING COMMISSION DECREE WAS THE AMOUNT OF MONEY THAT THE PROGRESS GROUP

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WOULD HAVE TO PAY OUT OF ITS OWN FUNDS; ON THAT WE

ACCEPTED A LIMITATION OF 75,000 DOLLARS AS REFLECTED IN

PROGRESS GROUPS' CONSENT TO THE SWISS BANKING COMMISSION'S DECREE. EVERYBODY REALIZED THAT THIS AMOUNT ALONG WITH AMOUNTS WHICH THE SWISS CREDIT BANK HAD AGREED TO PAY AND WHICH MIGHT BE OBTAINABLE FROM AIC 'ND AIER UNDER THE TERMS OF THE US COURT JUDGEMENT MIGHT NOT PROVE SUFFICIENT AND THAT ACCORDINGLY PAYMENT TO CARRY OUT THE SPECIAL AUDIT AND LIQUIDATION WOULD HAVE TO COME OUT OF THE MONEYS IN WHICH INVESTORS HAD AN INTEREST. WHILE WE WERE ALL AGREED THAT WE WOULD TRY TO KEEP COSTS DOWN SO THAT AS LITTLE AS POSSIBLE WOULD COME OUT OF INVESTORS FUNDS THERE ARE PROVISIONS IN THE DECREE FOR THE SWISS BANKING COMMISSION TO ORDER PAYMENTS, AND THESE MAY OF COURSE COME OUT OF INVESTORS' FUNDS.

3. THE PROPOSAL WHICH HAS BEEN SUBMITTED IS FOR COOPERS AND LYBRAND OF BOSTON TO BE EMPLOYED BY COOPERS AND LYBRAND OF BASEL TO WORK ON THE AUDIT. THIS WOULD MAKE THE COST AN EXPENSE OF COOPERS AND LYBRAND OF BASEL AND THEREFORE APPROPRIATELY PAID UNDER THE SWISS BANKING COMMISSION DECREE.

4. ACCESS OF COOPERS AND LYBRAND OF BOSTON TO NAMES OF THE INVESTORS: IT IS CORRECT THAT THE QUESTION OF ACCESS TO THE NAMES OF INVESTORS IS COVERED BY THE SWISS BANKING COMMISSION DECREE AND DR. MUELLER'S LETTER OF JUNE 15 TO COOPERS AND LYBRAND OF BASEL. UNFORTUNATELY THE PROPOSALS NOW BEING MADE ARE IN DIRECT CONTRADICTION TO DR. MUELLER'S LETTER OF JUNE 15. THAT LETTER PROVIDES THAT COOPERS AND LYBRAND OF BASEL IS TO WORK JOINTLY WITH COOPERS AND LYBRAND U.S. ON THE AUDIT, AND THAT COOPERS AND LYBRAND U.S. (BOSTON) IS TO HAVE ACCESS WITHOUT LIMITATION TO ALL THE INFORMATION, INCLUDING THE NAMES OF ALL INVESTORS. WHAT IS NOW BEING PROPOSED IS THAT COOPERS AND LYBRAND U.S. BE EXCLUDED FROM GAINING ACCESS TO CERTAIN INFORMATION, SPECIFICALLY THE NAMES OF CERTAIN INVESTORS. THIS IS DIRECTLY CONTRARY TO THE PROVISIONS OF DR. MUELLER'S LETTER OF JUNE 15.

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5. THE REASONS WHY THE NAMES OF THE INVESTORS ARE NEEDED WERE DISCUSSED AT LENGTH PRIOR TO ISSUANCE OF THE SWISS BANKING COMMISSION DECREE AND RESULTED IN THE ISSUANCE OF DR. MUELLER'S JUNE 15 LETTER. TO RECAPITULATE THE HISTORY: THE ORIGINAL SWISS BANKING COMMISSION DECREE TO WHICH THE PROGRESS GROUP CONSENTED PROVIDED FOR APPOINTMENT OF "AN INTERNATIONAL AUDITOR". IN THIS CONNECTION THE SEC HAD A NUMBER OF CONVERSATIONS WITH DR. MUELLER

AND HIS STAFF IN WHICH IT WAS AGREED THAT COOPERS AND LYBRAND OF BASEL AND COOPERS AND LYBRAND U.S. WOULD

JOINTLY ACT AS THE INTERNATIONAL AUDITORS. THE SEC ALSO SPOKE TO MUELLER ABOUT ARRANGING FOR COOPERS AND LYBRAND U.S. PERSONNEL TO COME TO SWITZERLAND AND BEGIN THEIR WORK. IT WAS ON THIS BASIS THAT THE SEC OBTAINED ACCEPTANCE OF THE SWISS BANKING COMMISSION DECREE BY OTHER USG AGENCIES. IT WAS ALSO BECAUSE OF THE SEC'S UNDERSTANDING THAT COOPERS AND LYBRAND U.S. WAS ACCEPTABLE TO THE SWISS BANKING COMMISSION THAT THE SEC OBTAINED A U.S. COURT DECREE DESIGNATING COOPERS AND LYBRAND U.S. AS SPECIAL AUDITOR UNDER THE U.S. DECREE. UNFORTUNATELY THE U.S. COURT WOULD NOT APPROVE THE ORIGINAL SWISS BANKING COMMISSION DECREE. A NEW CONSENT AND PROPOSED DECREE WAS THEN NEGOTIATED. THIS NEW CONSENT AND DECREE, WHICH WAS SIGNED BY DR. STUEDER, STILL PROVIDED FOR THE APPOINTMENT OF AN "INTERNATIONAL AUDITOR". AT THE VERY LAST MINUTE THE SEC WAS INFORMED THAT THE SWISS BANKING COMMISSION INSISTED ON DESIGNATING COOPERS AND LYBRAND OF BASEL AS THE AUDITORS UNDER THE SWISS BANKING COMMISSION DECREE. THIS PROPOSAL WOULD HAVE PLACED THE SEC IN AN IMPOSSIBLE POSITION SINCE THE U.S. COURT HAD ASKED COOPERS AND LYBRAND U.S. TO DO THE SPECIAL AUDIT AND REPORT TO IT. THE JUNE 15 LETTER WAS DEVISED TO GET AROUND THIS PROBLEM. IT PERMITTED THE SWISS BANKING COMMISSION TO DESIGNATE COOPERS AND LYBRAND OF BASEL AS SPECIAL AUDITORS UNDER THEIR DECREE, BUT ALSO ASSURED THAT COOPERS AND LYBRAND U.S. WOULD HAVE ACCESS TO ALL INFORMATION AND WOULD BE ABLE TO REPORT TO THE U.S. COURT.

6. TO FURTHER ASSURE THE SWISS BANKING COMMISSION THAT COOPERS AND LYBRAND U.S. WOULD NOT MISUSE THE INFORMATION LIMITED OFFICIAL USE

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IT OBTAINED CONTROL OVER, ALL OF THE RECORDS WERE PLACED IN THE HANDS OF COOPERS AND LYBRAND BASEL WITH INSTRUCTIONS THAT NO RECORDS WOULD BE PERMITTED TO LEAVE THE TERRITORIAL LIMITS OF SWITZERLAND EXCEPT IN ACCORDANCE WITH THE SWISS BANKING COMMISSION DECREE. AT THE TIME THE SEC (BOROWSKI) EXPRESSED SOME CONCERN OVER THE FACT THAT THIS WAS BEING DONE BY LETTER, BUT DR. MUELLER ASSURED THE SEC THAT THERE WOULD BE NO PROBLEMS IN CARRYING OUT THE TERMS OF HIS LETTER. BOROWSKI ACCEPTED THESE ASSURANCES AND AGAIN SUBMITTED THE NEW SWISS BANKING COMMISSION DECREE ALONG WITH THE RELEVANT PORTION OF DR. MUELLER'S LETTER TO THE COURT. THE COURT SUBSEQUENTLY APPROVED THE COMMISSION, SPECIAL COUNSEL AND THE SPECIAL AUDITORS ACTING UNDER THE DECREE IN ACCORDANCE WITH THE TERMS OF THE JUNE 15 LETTER.

7. THE U.S. COURT IS RELYING ON COOPERS AND LYBRAND U.S. TO SATISFY IT AS TO THE ACCURACY AND COMPLETENESS OF THE AUDIT. COOPERS AND LYBRAND US CANNOT DO THIS EFFECTIVELY WITHOUT ACCESS TO THE UNDERLYING DATA AND THE ABILITY TO THOROUGHLY REVIEW AND EXPLORE ALL QUESTIONABLE AREAS. REFUSAL TO PERMIT COOPERS AND LYBRAND U.S. FREE ACCESS TO THE NAMES MEANS THEY WILL NOT LOOK AT ORIGINAL RECORDS AND WILL THEN NOT BE ABLE TO PERFORM A TRUE AUDIT FUNCTION. SINCE THE NAMES OF INVESTORS COULD BE EXPECTED TO BE CONTAINED THROUGHOUT THE RECORDS THE REFUSAL TO PERMIT ACCESS TO THE NAMES REPRESENTS A REFUSAL TO PERMIT ACCESS TO ANY OF THE UNDERLYING RECORDS. COOPERS AND LYBRAND OF BASEL HAS ADMITTED THAT THIS IS THE PRIMARY REASON WHY ACCESS TO THE RECORDS IN LUGANO IS BEING DENIED. IF COOPERS AND LYBRAND U.S. HAS TO ACCEPT ON FAITH THE CONCLUSIONS REACHED BY OTHERS, ITS EFFECTIVENESS AS AUDITOR WILL BE NULLIFIED.

8. THE SEC BELIEVES THAT TO BEGIN THE AUDIT UNDER THE PRESENT ARRANGEMENT WOULD IMPLY THAT THE SEC ACCEPTS A DETERMINATION NOT TO HONOR THE JUNE 15 LETTER, AND THIS WOULD BE MOST UNFAIR.

9. PHYSICAL PRESENCE OF COOPERS AND LYBRAND U.S. IN LUGANO: IF COOPERS AND LYBRAND OF BOSTON CANNOT WORK IN LUGANO, THEY CANNOT PARTICIPATE IN THE ACTUAL AUDIT. THIS WOULD MAKE IT IMPOSSIBLE FOR THEM TO FULFILL THEIR LIMITED OFFICIAL USE

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